

MOTION FILED
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

—
No. 78-685
—

ABERDEEN AND ROCKFISH RAILROAD COMPANY, et al.,
Petitioners,
v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
Respondents.

**MOTION OF FORT HOWARD PAPER COMPANY
TO INTERVENE AS PARTY AS OF RIGHT
AND
OPPOSITION TO PETITION FOR WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT**

—
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**MOTION OF FORT HOWARD PAPER COMPANY
TO INTERVENE AS PARTY AS OF RIGHT**
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Movant, Fort Howard Paper Company of Green Bay, Wisconsin ("Fort Howard") respectfully requests that this Court enter an order allowing it to intervene as a party for the following reasons. On July 10, 1978, the Petitioners, Aberdeen and Rockfish Railroad Company, *et al.* ("Railroads"), filed with the United States Court of Appeals for the District of Columbia a petition for review of the decision and order of the Interstate Commerce Commission ("Commission") in *Ex Parte No. 343, Nationwide Increased Freight Rates and Charges, 1977*, served June 29, 1978. Fort Howard, a party before the Commission below, filed a motion for leave to intervene as a matter of right pursuant to 28 U.S.C. § 2348 on July 20, 1978.

A copy of that motion to intervene is attached as Movant's Appendix A. Also on that date, the Respondent, the Commission and the United States, filed a motion to dismiss the petition for review, arguing that the court lacked jurisdiction to review a Commission order in a general rate increase proceeding.

By per curiam order filed July 25, 1978, the Court of Appeals granted the motion to dismiss the petition for review. Thereafter, by order filed July 27, 1978 the court dismissed as moot Fort Howard's motion to intervene, as well as similar motions filed by three other parties who had appeared before the Commission. This latter order is attached as Appendix B.

28 U.S.C. § 2348 authorized Fort Howard to intervene as a matter of right in the appeal before the United States Court of Appeals, and but for the court's order dismissing the Petitioners' appeal, Fort Howard would have been granted leave to intervene. Accordingly, in order to protect its interest and participate in this matter, it should be made a party to proceedings before this Court.

WHEREFORE, Fort Howard requests that this Court grant it leave to intervene as a party in support of the Respondents.

Respectfully submitted,

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ABERDEEN AND ROCKFISH RAILROAD COMPANY, *et al.*,
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v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
Respondents.

**OPPOSITION TO PETITION FOR WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT**

Fort Howard opposes the Petition for Writ of Certiorari sought by the Petitioners to review the order of the United States Court of Appeals for the District of Columbia entered on July 25, 1978 in *Aberdeen & Rockfish Railroad Company v. Interstate Commerce Commission and United States of America*, No. 78-1636.

DECISION BELOW

By per curiam order filed July 25, 1978, the United States Court of Appeals for the District of Columbia Circuit granted the motion of the United States and the

Interstate Commerce Commission to dismiss the railroads' petition for review of the decision and order of the Interstate Commerce Commission served June 29, 1978 in *Ex Parte No. 343, Nationwide Increased Freight Rates and Charges, 1977*.

JURISDICTION

28 U.S.C. § 1254(1) authorizes this Court in its discretion to issue writs of certiorari for review of cases from the United States Court of Appeals.

QUESTION PRESENTED

Did the Court of Appeals properly dismiss the railroads' petition for review from an opinion and decision of the Interstate Commerce Commission allowing general rate increases in amounts for certain commodities with which the railroads are dissatisfied?

STATUTES INVOLVED

The statutory provisions involved are Section 6(3) and 13(1) of the Interstate Commerce Act, 49 U.S.C. §§ 6(3) and 13(1), which are set forth in full in Appendix C hereto.

STATEMENT OF THE CASE

By petition filed September 26, 1977, the railroads sought permission from the Commission to file a master tariff effective November 30, 1977 generally increasing their freight rates and charges by 5% subject to certain holdowns and exceptions. Said petition was docketed as *Ex Parte No. 343, Nationwide Increased Freight Rates and Charges, 1977*.

By decision served September 29, 1977, the Commission authorized the filing of said master tariff, subject to protest and possible suspension, and provided for the filing of protests by persons opposing the proposed increases. Over 250 persons, including Fort Howard, filed protests to that master tariff.

The Commission served an order on November 10, 1977 declining to suspend the tariff, which allowed the 5% increase in rates and charges. However, in that order the Commission instituted an investigation into the lawfulness of the rates and charges for seven commodities, including recyclables. The Commission explained that it chose such commodities for investigation on the basis of the record and its analysis of the 1975 waybill sample which indicated for each commodity that over half of the revenue earned was associated with movements which returned revenue in excess of 180% of variable costs. Copies of the Commission's decisions served September 29, 1977 and November 10, 1977 are reproduced as Appendix D and Appendix E respectively.

After completing its investigation and considering the entire record, on June 29, 1978 the Commission served its decision herein and concluded that the railroads failed to justify a full 5% increase on the investigated commodities. The Commission stated in pertinent part:

We find that while respondents have generally justified the 5-percent increase based on their overall revenue need (see November 10, 1977 order in this proceeding), they have failed to establish that the increases on the commodities under investigation are justified on the basis of the cost of pro-

viding the services in issue. This investigation was precipitated by the high rate/cost ratios exhibited by these commodities. In the context of this proceeding cost evidence is important in determining whether the increases on these commodities are just and reasonable. The evidence produced by respondents does not fully justify the 5-percent increase. However, a lesser increase is justified due to the carriers' overall revenue needs. Taking this into consideration, the increases will not be denied in their entirety, but will be authorized in varying percentages. It should be noted that the proposed 5-percent increase, if authorized, would result in a disproportionate contribution by these commodities, a result not justified by the evidence in this proceeding.

(Pet. Ap. C, 35a-36a).

The Commission authorized general increases of either 2 or 3 percent for each of the 7 commodities involved and ordered the railroads to make appropriate refunds of the rates in excess of these amounts which they had been collecting at the 5% level.

The railroads filed a petition for review of the Commission's decision in the United States Court of Appeals for the District of Columbia Circuit. The Interstate Commerce Commission and the United States filed a motion to dismiss the petition on the basis that Commission orders in general rate increase proceedings are not reviewable until after a complainant has exhausted his administrative remedies.

On July 25, 1978, the Court of Appeals filed an order granting the motion to dismiss and, thereafter, the railroads applied to this Court for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

Fort Howard submits that a writ of certiorari should not be issued in this case because the decision below was clearly correct in dismissing the railroads' petition for review, and was not in conflict with any decisions of this Court or with those of any other circuit. As will be demonstrated, this matter is not novel and no compelling considerations of public policy exist to support the grant of a writ.

The Court Below Properly Dismissed The Railroads' Petition For Review Because That Court Lacked Jurisdiction To Review The Commission's Decision

Prior to discussing the appropriate principles of law which the Court of Appeals correctly applied in this case, it is important to observe that the Commission proceeding sought to be reviewed involved a general rate increase. The railroads were allowed to implement such increase and sought judicial review because they are disgruntled with the amount of the increase. Additionally, despite such increase, they complain about the policy discussions contained in the Commission's decision regarding the de-emphasis of the role of the general rate increase, which policy was obviously not applied in the instant case. The court below in its *per curiam* order recognized that complaints which either address the amount of a general rate increase or dicta incorporated into an administrative decision provide no basis for judicial review.

The prescription of freight rates is uniquely within the special expertise and qualifications of the Interstate Commerce Commission. *Atchison, Topeka & Santa Fe Railway Company v. Wichita Board of Trade*, 412 U.S.

800, 806 (1973); *United States v. Jones*, 336 U.S. 641, 652 (1949); *Interstate Commerce Commission v. Jersey City*, 322 U.S. 503, 513 (1943); *Mississippi Valley Barge Line v. United States*, 292 U.S. 282, 286 (1934). On numerous occasions, this Court has recognized as axiomatic the principle that courts lack authority to make an independent appraisal of the reasonableness of rates determined by the Commission. *E.g.*, *In Re Trans Alaska Pipeline Rate Cases*, — U.S. —, 98 S.Ct. 2053, 2058-59 (1978); *United States v. SCRAP*, 412 U.S. 669 (1973); *Arrow Transportation Company v. Southern R. Co.*, 372 U.S. 658 (1963). The inappropriateness of judicial review has been particularly recognized in cases involving challenges to the Commission's action in approving general rate increases, the type of administrative activity under review.

In *Aberdeen & Rockfish Co. v. SCRAP*, 422 U.S. 289 (1975), ("SCRAP") Mr. Justice White, speaking for this Court, detailed the broad nature of general revenue proceedings in which the country's railroads in large numbers seek across-the-board increases for all or nearly all of their rates. Both in *SCRAP* and in the instant proceeding, the Commission inquired into the issue of the railroads' revenue needs and to a lesser extent into the reasonableness of the increases as applied to certain broad categories of charges. These determinations are not subject to judicial review.

Starting with *Algoma Coal & Coke Co. v. United States*, 11 F. Supp. 487 (E.D. Va. 1935), followed by a legion of cases, including the recent decision in *Council of Forest Industries of British Columbia v. I.C.C.*, 570 F.2d 1056 (D.C. Cir. 1978), the federal courts have consistently held that judicial review of

Commission orders in general rate proceedings is unavailable to review the application of such rate increases to particular commodities. The factual patterns in those cases typically involve shippers challenging the general rate increases as applied to their commodities, while the railroads have argued that judicial review is unavailable. Indeed, as observed by this Court in *SCRAP*, *supra*, 422 U.S. at 310:

The railroads, but not the United States or the ICC, argue that the District Court had no jurisdiction to review the decision of the ICC, made in a general revenue proceeding, not to declare the increased rates unlawful. The argument is supported by a long line of District Court decisions; see, *e.g.*, *Algoma Coal & Coke Co. v. United States*, 11 F. Supp. 487 (ED Va. 1935); *Koppers Co. v. United States*, 132 F.Supp. 159 (WD Pa 1955); *Florida Citrus Comm'n v. United States*, 144 F. Supp. 517 (ND Fla. 1956), aff'd per curiam, 352 U.S. 1021, 77 S.Ct. 589, 1 L.Ed. 2d 595 (1957); *Atlantic City Electric Co. v. United States*, 306 F. Supp. 338 (SDNY 1969), and *Alabama Power Co. v. United States*, 316 F.Supp. 337 (DC 1969), both aff'd by an equally divided Court, 400 U.S. 73, 91 S.Ct. 259, 27 L.Ed. 2d 212 (1970); *Electronic Industries Assn. v. United States*, 310 F.Supp. 1286 (DC 1970), aff'd 401 U.S. 967, 91 S.Ct. 1188, 28 L.Ed. 2d 318 (1971).

Notwithstanding the posture of the parties in this case where the railroads are dissatisfied with the amount of their rate increases, this proceeding is but one of a host of appeals which have resulted in decisions recognizing that judicial review is inappropriate prior to the exhaustion of the complainants' administrative remedies with the Commission. As stated

in *Council of Forest Industries of British Columbia v. ICC*, 575 F.2d 1056, 1061:

Since the ICC normally limits itself in general revenue proceedings to broader issues and expressly reserves judgment on whether any particular rate instituted under the general ceiling would be just and reasonable, the courts have concluded that the ICC's general action leaves questions about particular rates open to be determined in later proceedings focusing on individual applications of the general increase. Judicial review is held to be available only after the appropriate administrative remedies have been exhausted.

In instances where the protestant is a shipper, the appropriate administrative remedy is found in 49 U.S.C. § 13 which authorizes the shipper to file a complaint regarding a particular rate for a specific commodity along a defined route. See *Atlantic City Elec. Co. v. U.S.* 306 F. Supp. 338 (S.D.N.Y. 1969); and *Alabama Power Company v. U.S.*, 316 F. Supp. 337 (D.C. 1969), both aff'd by an equally divided court, 400 U.S. 73 (1970). In cases involving a railroad complainant the appropriate remedy is contained in 49 U.S.C. § 6(3) which allows the railroad to file for an increase in its tariff, again, a particular rate for a specific commodity along a defined route, and the Commission's decision in granting increases does not preclude the railroad from exercising its rights contained in Section 6 of Title 49.

On page 11 of the Memorandum filed in support of their motion to stay pending review, the railroads recognized: "At the outset, there is a question concerning the reviewability of the Commission's June 20 order because it was issued in the context of a general

revenue proceeding." The court of appeals had no difficulty in recognizing that question and dismissing the railroad's petition. On appeal, the railroads weakly contend that their case is somehow different from the long line of cases denying review because they are carriers and not shippers, a distinction without a difference since both have further administrative remedies available under the Interstate Commerce Act.

Finally, the alleged error of the Commission arising from its statement regarding de-emphasis of the role of general rate increases provides no basis for departing from the established role concerning judicial review of decisions in general rate increase proceedings. In the first place, there was no such error. However, assuming, *arguendo*, any misinterpretation of the statute, the Commission clearly ignored its *dicta* in granting the general rate increase. Its action in doing so is not reviewable since the railroads have an administrative remedy available to them.

CONCLUSION

It is ironic that the railroads, which have long denied the reviewability of Commission determinations involving general rate increases, are seeking a writ from this Court to determine the correctness of a Commission proceeding of that nature. The petitioners have raised no serious challenge to the action of the court of appeals in dismissing this appeal. And, in view of the railroads' right to file new tariffs, it is unlikely that the decision below will have any extensive impact on the railroads generally.

For all of these reasons, Fort Howard respectfully urges that this Court deny the petition for writ of certiorari.

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APPENDIX

APPENDIX A

IN THE
UNITED STATES OF COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Civil Action No. 78-1636

ABERDEEN and ROCKFISH RAILROAD COMPANY, ET AL.,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION and THE UNITED STATES
OF AMERICA, *Respondents.*

[Received July 20, 1978]

MOTION FOR LEAVE TO INTERVENE

The Fort Howard Paper Company of Green Bay, Wisconsin ("Fort Howard") hereby moves this Court for leave to intervene in the above captioned action in support of the Respondent Interstate Commerce Commission, and respectfully states as follows:

1. On July 10, 1978, the Aberdeen and Rockfish Railroad Company *et al* filed a petition in this Court seeking review of the Decision and Order of the Interstate Commerce Commission in *Ex Parte No. 343, Nationwide Increased Freight Rates and Charges, 1977*, dated June 28, 1977, served on June 29, 1978.
2. This Motion for Leave to Intervene is filed pursuant to 28 U.S.C. § 2348. This Court has jurisdiction of this Motion for Leave to Intervene pursuant to 28 U.S.C. §§ 2321 and 2341 *et seq.*
3. Fort Howard was a party in the proceeding before the I.C.C. below and its interests will be affected if the

order of the I.C.C. is or is not set aside. Thus pursuant to 28 U.S.C. § 2348 it is entitled to appear and be represented by counsel in this proceeding to review the Interstate Commerce Commission's order.

WHEREFORE, the Fort Howard Paper Company of Green Bay, Wisconsin respectfully requests that it be made a party of record herein.

Respectfully submitted,

FORT HOWARD PAPER COMPANY
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Date: July 19, 1978

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1977

No. 78-1636

ABERDEEN AND ROCKFISH RAILROAD COMPANY, ET AL.,
Petitioners

v.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF
AMERICA, *Respondents*

[Filed July 27, 1978]

ORDER

On consideration of the motions of

1. National Association of Recycling Industries, Inc.,
2. The Fort Howard Paper Company of Green Bay, Wisconsin
3. Allied Chemical Corporation, et al.,
4. PPG Industries, Inc.

for leave to intervene and it appearing that an order was filed herein on July 25, 1978 granting respondents' motion to dismiss, and denying petitioner's motion for stay as moot, it is

ORDERED that the aforesaid motions for leave to intervene are denied as moot.

FOR THE COURT

GEORGE A. FISHER, CLERK

/s/ DANIEL M. CATHEY
Daniel M. Cathey
First Deputy Clerk

APPENDIX C

Relevant Statutes

* * *

§ 6

(3) No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection: *Provided*, That the Commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions: *Provided further*, That the Commission is authorized to make suitable rules and regulations for the simplification of schedules of rates, fares, charges, and classifications and to permit in such rules and regulations the filing of an amendment of or change in any rate, fare, charge, or classification without filing complete schedules covering rates, fares, charges or classifications not changed if, in its judgment, not inconsistent with the public interest.

* * *

§ 13

1) Any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contraven-

tion of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

APPENDIX D

INTERSTATE COMMERCE COMMISSION

[Service Date September 29, 1977]

ORDER

EX PARTE NO. 343

NATIONWIDE INCREASED FREIGHT RATES AND CHARGES—1977

(Authority to File Master Tariff)

By petition and verified statements filed September 26, 1977, the railroads listed in Appendix I of the petition, and certain water and motor carriers having joint rates with the Appendix I railroads, request the Commission to institute an investigation into the adequacy of freight rates and charges of all railroad common carriers within the United States. Petitioners request that all such railroad common carriers be made respondents in such investigation. Petitioners ask that the Commission authorize and permit increases in freight rates and charges from, to, and within all territories of 5 percent, effective November 30, 1977, to offset labor cost increases and increases in the cost of materials, supplies, and certain other items, subject to exceptions and holdowns set forth in Appendix II of the petition.

Petitioners seek permission to make the proposed increases effective November 30, 1977, subject to the condition that refunds shall be made in the event that, after any investigation that the Commission deems necessary, no increase or a lesser increase than that requested is authorized. Petitioners also seek entry of an order modifying all outstanding Commission orders to the extent necessary to enable the railroads to file and make effective the proposed increased rates and charges. Such order is also requested to allow the entry of appropriate orders under Sections 4 and 6 of the Interstate Commerce Act.

The petitioners have filed and served 30 verified statements constituting their evidential case pursuant to the requirements set forth in *Procedures Governing Rail Carrier General Increase Proceedings*, 49 CFR 1102, including certain financial data suggested in Appendix B of the report and order in Ex Parte No. 281, *Increased Freight Rates and Charges*, 1972, 341 I.C.C. 288. Petitioners have also submitted data of the type called for in Ex Parte No. 290 (Sub-No. 1), *Procedures—Rail Car General Increase Proceedings*, 349 I.C.C. 22, namely detailed information on estimated revenues which would have been obtained had the last authorized increase been fully applied, and the actual total increase in revenues realized by application of the last authorized general increase.

The petitioners have given notice of the petition and have furnished data to the public in compliance with Ex Parte No. 286, *Notices of Increases in Frt. Rates and Pass. Fares*, 349 I.C.C. 741, and with section 5b of the Interstate Commerce Act.

The petitioners have also submitted information of the type called for in Ex Parte No. 55 (Sub-No. 4), *Revised Guidelines for the Implementation of the National Environmental Policy Act of 1969*, 352 I.C.C. 451 and 49 CFR 1108, namely a supplemental evaluation of environmental considerations with regard to the petitioners' increased rate proposal. The petitioners contend that the requested increases will have no significant adverse effects upon the movement of the traffic or transportation of recyclable commodities by rail. Any person or persons believing that the requested increases, if authorized, would have a significant impact upon the quality of the human environment are invited to comment upon this matter in verified statements authorized to be filed pursuant to this order. Environmental matters and the requirements of the National Environmental Policy Act of 1969 will be fully considered by this Commission in any subsequent action on the merits of the requested general increases.

By Special Permission Order No. 77-5350, served in conjunction with this order, the Commission is authorizing the filing of tariff schedules increasing rates and charges sought in the petition. These tariff schedules are to become effective upon not less than 30 days' notice to the Commission and the general public, subject to protest and possible suspension as provided by the Interstate Commerce Act. By this Special Permission Order, the Commission is also authorizing the modifying of outstanding orders to the extent necessary to permit this filing.

It is ordered, That all common carriers by railroad be, and they are hereby, made respondents to this proceeding.

It is further ordered, That pursuant to the special permission authority granted in conjunction with this order, the tariff schedules shall be published and filed upon not less than 30 days' notice effective not earlier than November 30, 1977, nor later than December 30, 1977,¹ *subject to protest and possible suspension*. These schedules are to contain an appropriate refund provision. Verified statements shall be filed on or before October 28, 1977, in accordance with the procedures as outlined in the following paragraph.

It is further ordered, That any person opposing or wishing to comment on the proposed 5-percent increase in rates and charges shall file and serve verified statements,² as provided below.

(a) The verified statements shall contain all evidence relevant and material to the issues in this proceeding which the parties desire to have considered by the

¹ In the event the tariff is not filed prior to October 10, 1977, the due date specified for the filing of protests and verified statements will be extended to a date 20 days prior to the effective date, and the reply date will be correspondingly extended.

² Section 15(3)(d) of the Interstate Commerce Act specifically requires the filing of vertical complaints seeking suspension of proposed rate changes.

Commission, as a basis for a decision on the merits. Any submission on asserted environmental impact shall be set forth under an appropriate subheading in order to identify properly such subject matter.

- (b) Verified statements may include arguments in support of an affiant's position but such argument shall be set forth in a separate section of the document containing the verified statement. If desired, such argument may be contained in a separate document simultaneously filed and served.
- (c) Each verified statement shall be signed in ink by affiant and verified (notarized) in the manner provided by Rule 48 and Form No. 6 of the Commission's General Rules of Practice (See 49 1100.48 and Appendix B, Form No. 6, to 49 CFR 1100). The post office address of affiant or his counsel shall be shown.
- (d) Verified statements and arguments shall be filed and served as follows:

The original and 20 copies of each such document for the use of the Commission shall be addressed to the Secretary, and sent to the Office of Proceedings, Room 5342, Interstate Commerce Commission, Washington, D.C. 20423, except that a lesser number of copies may be filed upon showing of good cause. All documents filed with the Commission in this matter shall contain the following notation on the envelope: *Ex Parte No. 343*.

One copy shall be served upon the representative of the petitioning railroads, James L. Howe, III Esq., 527 American Railroads Building, 1920 "L" Street, N.W., Washington, D.C. 20036, which service shall constitute service upon all respondents. However, all parties able to do so shall serve 20 copies upon the

railroads' representative. In all cases, where service is made by mail, the document shall be mailed in time to be received by the respective due dates.

- (e) Each verified statement shall contain a certificate of service stating that it has been timely served on opposing parties, as herein provided.
- (f) Verified statements and arguments by persons opposed to the proposed increases in rates and charges shall include all matters which they desire the Commission to consider with respect to statutory suspension of the rates pending completion of the investigation, as well as evidence relevant to the ultimate decision.

It is further ordered, That on or before November 4, 1977, the respondents shall file with the Commission and serve upon opposing parties such replies to protests or other pleadings seeking suspension, and rebuttal evidence on the merits of the proceeding as they desire to present. Such evidence shall be in the form and served in the same manner as the opening statements filed in accordance with the regulation published in 49 CFR 1102, except that replies and rebuttal evidence need be served only upon the party (and his counsel if known) to whose evidence the reply or rebuttal is directed. However, replies or rebuttal statements proposing changes in the tariffs shall be served on all parties. All such statements shall be furnished to interested parties upon request.

It is further ordered, That the request for fourth-section relief will be considered following the filing of verified statements and replies.

And it is further ordered, That in all other respects the petition be, and it is hereby, denied.

SPECIAL PERMISSION No. 77-5350

It is ordered, for good cause shown:

1. All railroads, and water and motor carriers to the extent they have joint rates with the railroads, and their tariff-publishing agents, be, and they are hereby, except as otherwise provided herein, authorized to depart from the Commission's tariff publishing rules in Tariff Circular No. 20 (49 CFR 1300), when publishing and filing tariffs, and tariff amendments, to become effective upon not less than 30 days' notice to the Commission and the public but not earlier than November 30, 1977, nor later than December 30, 1977, providing for increased rates and charges as set forth in the petition:

- (a) By publishing and filing a master tariff of increased rates and charges, and supplements to the master tariff, providing increases by means of conversion tables of rates and charges, which shall include, and maintain in effect, a refund provision reading as follows:

In the event any increases resulting from the application of this tariff exceed the increases subsequently approved or prescribed by the Interstate Commerce Commission, the carriers will refund the difference between the increase resulting from the application thereof and any increases which may subsequently be approved or prescribed by the Interstate Commerce Commission with — percent interest.³

In the event any increase resulting from the application of this tariff is disapproved by the Commiss-

³ The interest rate to be inserted in the refund provision shall be equal to the average yield (on the date such schedule is filed) of marketable securities of the United States which have a duration of 90 days. See Section 15(8)(e) of the Interstate Commerce Act.

sion and no increase is authorized, the carriers will refund the full amount of the increase collected with — percent interest.⁴

The master tariff shall be indicated to expire on interstate and foreign commerce with a date not beyond one year after the effective date, which may not be extended or cancelled except upon specific authorization of this Commission, and all relief granted in this order expires with that date. The master tariff must initially contain all provisions for application of the increases (including provisions for no increase, part of the overall proposal) following which (unless suspended) any provisions other than those of a general character may be cancelled and transferred to the particular tariff affected upon a common effective date with appropriate notation to that effect in the master tariff amendment.

- (b) By publication and filing of a connecting link supplement to each tariff to be made subject to the master tariff, connecting such tariffs with the master. Such supplements may be blanket supplements (a common supplement issued to two or more tariffs).
- (c) The master tariff and connecting link supplements issued and filed under this order shall not provide for nonapplication on interstate traffic competitive with intrastate traffic between the same points unless the interstate rates and routes are specifically identified in the connecting link supplements.
- (d) By publication and filing of tariffs or amendments to tariffs effective concurrently with the master tariffs and upon the same notice which provide specifically increased rates and charges but which do not result in an increase in charges for transportation and

⁴ See, footnote 3.

other services greater than those specified in the petition, provided all such publication is identified in the tariffs and made subject to a refund clause worded substantially as in paragraph 1(a) above.

- (e) By publication of provisions in tariffs or amendments thereto subjecting rates and charges therein to the provisions of the master tariff, subject to the restriction in (c) above.
- 2. (a) The master tariff, as amended, and all other tariffs and amendments to tariffs, that employ the short-form methods authorized herein shall bear the notation:

Form of publication authorized,
I.C.C. permission No. 77-5350

- (b) Tariffs or amendments to tariffs publishing specifically increased rates or charges hereunder shall bear a notation reading:

Publication made in accordance
with I.C.C. permission No. 77-5350

- 3. Connecting-link supplements authorized herein shall be exempted from the Commission's tariff-publishing rules governing the number of supplements and the volume of supplemental matter permissible.
- 4. The master tariff filed under this order shall not be amended except to correct errors and to comply with findings and orders of the Commission, except when specifically authorized to do so. The terms of rule 9(e) (40 CFR 1300.9 (e)) are not waived as to supplements to the master tariff.
- 5. Outstanding orders of the Commission are hereby modified only to the extent necessary to permit the filing of tariff publications containing the proposed

increases, and all tariff publications filed shall be subject to protest and possible suspension and rejection. In that regard, we direct petitioners' attention to our admonitions in prior general increase proceedings concerning maintenance and preservation of existing port relationships. See, for example, *Increased Freight Rates and Charges, 1972*, 341 I.C.C. 288, 336, and *Increased Freight Rates, 1970 and 1971*, 339 I.C.C. 125, 188. The rate increase table on grain shall progress in one-half cent increments.

It is further ordered, That future orders and notices of the Commission in this proceeding will be sent only to those participating as herein provided, and those interested persons who specifically request to be included on the service list.

And it is further ordered, That notice of this order be given by serving a copy thereof on each party to the proceedings in Ex Parte No. 336, to the Governor and public utility regulatory body of each State, the Environmental Protection Agency, the Special Assistant to the President for Consumer Affairs, and by depositing a copy in the Office of the Secretary of the Commission at Washington, D.C., and by filing a copy with the Director, Office of the Federal Register for publication in the Federal Register.

Decided September 29, 1977.

By the Commission.

H. G. HOMME, JR.
Acting Secretary

(SEAL)

APPENDIX E

INTERSTATE COMMERCE COMMISSION

Order

Ex PARTE NO. 343

[Service Date—November 10, 1977]

NATIONWIDE INCREASED FREIGHT RATES AND CHARGES—1977

In an order served September 29, 1977, we permitted the filing of a master tariff, subject to protest and possible suspension, providing for publication of increases in all freight rates and charges from, to, and within all territories of 5 percent, effective November 30, 1977, subject to specified exceptions. The justification for the proposed increase, as presented in verified statements filed by the carriers, is to offset labor cost increases and increases in the cost of materials, supplies, and certain other items.

The record in this proceeding consists of (1) the initial petition and verified statements of the railroads filed September 26, 1977; (2) the order of the Commission served September 29, 1977; (3) the Tariff of Increased Rates and Charges X-343, as supplemented; (4) the 263 protests and/or verified statements; (5) the railroad replies thereto; and (6) oral argument held before the Commission on November 8, 1977.

The record discloses that the revenue yield from the proposed 5-percent increase will not exceed the increased costs of labor, materials, supplies, and other items not previously considered in Ex Parte No. 336 and cost increases that have occurred since the last general increase. Without a 5-percent increase in rates and charges, sufficient funds will not be available to the railroads to defray the cost escalations shown of record. Furthermore, it is estimated that the added revenue expected from the proposed increase will fail to meet the cost escalations which have already been

incurred and those which are imminent nationwide and in all territories. Thus, it appears that the proposed increase is necessary to prevent a further decline in the railroads' overall financial condition. This is evidenced by the carriers' rate of return which, nationwide, is 1.68 percent for the twelve months ending June 30, 1977, and does not exceed 5.12 percent in any district (See, *Increased Freight Rates and Charges, 1973*, 344 I.C.C. 589, 614).

We conclude that the record in this proceeding warrants a finding that the Commission should decline to exercise its authority to suspend X-343, as supplemented, conditioned upon the carriers filing of a supplement, on no less than 5 days' notice, to become effective November 30, 1977, providing as follows:

1. That the increase on feed grains from Midwestern origins to New England points shall be no greater than 3 percent.
2. That there shall be no increase on wood chip rates in the Items 165 and 180-series, MP Tariff 86-G, ICC 629, on interstate traffic.

However, the Commission will order an investigation, directed to the commodities listed below. These commodities have been selected on the basis of the record and our analysis of the 1975 waybill sample which indicates that, in each case, over half of the revenue earned by the commodity is associated with movements which returned revenue in excess of 180 percent of variable cost.¹ We have considered in detail the protests and verified complaints filed in opposition to the proposed increase on other commodities, in-

¹ The analysis of these commodities is based on a burden type study of the 1975 1% waybill sample performed in support of the Commission's recent study, the Impact of the 4-R Act, Railroad Ratemaking Provisions, submitted to the Congress October 5, 1977. The study will be made available by the Commission's Bureau of Economics.

cluding grain. With regard to the latter, an investigation does not appear warranted at this time, particularly in view of the pendency of Ex Parte No. 270 (Sub-No. 9), Investigation of Railroad Freight Rate Structure—Grain and Grain Products.

It is ordered:

1. That an investigation be instituted into the lawfulness of the rates, charges and regulations, as set forth in the Tariff of Increased Rates and Charges, X-343, as supplemented, on the following:

	<i>SPC No.</i>
1. Newsprint Paper	57
2. Sodium Alkalies	69
3. Industrial Gases	71
4. Sulphuric Acid	73
5. Rubber, Natural or Synthetic	78
6. Manufactured Iron or Steel	100
7. Recyclables	NA

A further order will be issued in the near future setting procedures to be followed in this investigation.

2. That all parties are requested to submit separate briefs on the question of the interrelationship of the special rate provisions of the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act) and railroad general increase proceedings. Briefs are to be submitted by railroad respondents no later than 20 days from date of service of this order, and 20 days thereafter by all other parties.

In making effective any increases permitted herein, the carriers are required to protect and maintain all existing port relationships, duly established by order of the Commission or recognized customs of the trade, and to observe the prohibitions of the Interstate Commerce Act with re-

gard to unjust discrimination and undue and unreasonable preference and prejudice.

Respondents are required to continue on a priority basis their efforts to bring tariff schedules up to date, particularly in the East, where the updating has not been as substantial as in other territories, and they shall report their progress to the Commission's Bureau of Traffic on a quarterly basis until otherwise ordered.²

As noted above, an investigation has been instituted with regard to the rates on recyclable commodities. In connection with our decision not to suspend, the following should be noted. Increases in recyclable rates in Ex Parte No. 295 (Sub-No. 1), *Increased Freight Rates and Charges, 1973—Recyclable Materials*, and Ex Parte No. 319, *Investigation of Freight Rates for the Transportation of Recyclable or Recycled Materials*, were found to have a small, and insignificant impact on the environment profiles in the recycling industry, since non-price factors were found to be more important than changes in freight rates. The record here presents no new information, studies, or critiques which would warrant conclusions different than those in the previously cited reports. Accordingly, we conclude that this action will not significantly affect the quality of the human environment. In addition, the energy impacts of this action will not be significant within the meaning of the National Environmental Policy Act of 1969 in view of the fact that potential diversion should be minimal in light of general inflationary trends, higher freight rates for other modes, and the railroads' stated intention to adjust rates when faced with competition from other modes.

² Pursuant to section 209 of the 4-R Act, it is required that all rates be incorporated into the individual tariffs of each railroad or ratemaking association within 2 years after the initial publication of the rate, or within 2 years after a change in any rate is approved by the Commission, whichever is later.

We note that the procedures established in Ex Parte No. 290, *Procedures Governing Rail General Increase Proceedings*, will become effective January 1, 1978. The carriers are hereby advised that this Commission expects full compliance with those regulations in all future rail general increase proceedings. Failure to comply may result in denial of the carriers' petition.

All outstanding orders of the Commission are modified to the extent necessary to permit the proposed increases to become effective. Should the carriers be unwilling to comply with the condition set forth on page 1 of this order, we will reconsider our decision not to suspend.

FOURTH SECTION ORDER NO. 20536

It appearing, That respondent railroads applied for relief from the provisions of Section 4 of the Act necessary to establish the rates and charges originally sought; that the increases in rates and charges authorized herein cannot be published and made effective without producing in some instances rates or charges that yield greater compensation in the aggregate for the transportation of the like kind of property for a shorter than for a longer distance over the same line or route in the same direction, or greater compensation as a through rate or charge than the aggregate of intermediate rates or charges subject to the Act, in contravention of Section 4 thereof; that the increased cost of railroad operation necessitates the increases in rates and charges involved in this proceeding which cannot be made effective without fourth-section relief; that application of the increased charges to or from more distant points will not result in the establishment of rates to or from more distant points that are not reasonably compensatory; that no protestant adequately opposed issuance of the fourth-section relief sought on the ground that it would be adversely affected by the fourth-section departures that may be created by the increased rates; and that a special case has been presented in which the Commission may authorize relief from the provisions of Section 4;

It is ordered, That carriers subject to the Interstate Commerce Act and parties to said proceeding be, and they are hereby, authorized to establish and maintain the increased rates and charges described herein without observing the provisions of Section 4 of the Act;

It is further ordered, That parties to said proceeding be, and they are hereby, authorized to establish and maintain rates and charges permitted to become effective in this order without observing the long-and-short haul provisions of Section 4 of the Act in cases arising out of the failure to apply the full increases in rates and charges over interstate routes between points in a single State, in turn caused by the failure of the State authorities to authorize the full increases permitted in this proceeding;

And it is further ordered, That in those instances in which rates in contravention of Section 4 are established under authority contained herein, the schedule containing such rates shall make reference to this order in the manner required by Rule 28 of Tariff Circular No. 20.

AMENDMENT TO SPECIAL PERMISSION No. 77-5350 AUTHORIZING CERTAIN DEPARTURES FROM THE COMMISSION'S PUBLISHED TARIFF AND ORDER REGARDING SPECIAL PERMISSION No. 398

It is ordered:

That Special Permission No. 77-5350 be, and it is hereby, amended to permit the establishment of the increases in freight rates and charges authorized by the Commission in this order, subject to the terms, conditions and limitations provided therein.

Pursuant to Special Permission Application No. 398 filed October 31, 1977, Western Trunk Line Committee, Agent, proposes to amend various items of Tariff of Increased Rates and Charges X-343, WTL ICC A-5067, on behalf of all railroad parties to the X-343 proceeding and other agents and carriers.

The applicant proposes to amend on 15 days' notice, effective no earlier than November 30, 1977, Item 55 under "Non-Application of Increases" by including line-haul rates on Wood Chips (Pulpboard) and related articles, as published in Items 165 and 180-series, MP Tariff 86-G, ICC 629 on Interstate Traffic, to those rates not taking the increase. The provision is to expire on December 31, 1977, with the carrier stating that this is in accordance with their commitment to the paper industry to forego any further increases in 1977. By provisions of the Commission's order authorizing the X-343 increases in freight rates and charges, the increase will not apply on wood chip rates named in the issue tariff. Therefore, this portion of the special permission application is moot.

The applicant proposes to amend on 15 days' notice, Item 1455 of the X-343 master tariff, Auto Parts, to provide that line-haul rates on Auto Parts are not subject to increases in Eastern Territory, by deleting all words following "referred to in Note 24", thereby making the deferral of increases applicable to all rates in the East on auto parts and accessories. The applicant contends it was their original intent to provide for this application of the item.

It is ordered, That the application with regard to the proposed amendment of Item 1455 of the X-343 master tariff on 15 days' notice is granted.

Authority is also requested to amend Items 77 of the X-343 master tariff, on statutory notice, by adding a paragraph that paper and paper articles listed in Item 585 of SFTB Tariff 867-F, ICC S-1181 will not be subject to increases on line-haul rates, except the increases will apply on certain minimum weights from Southern Territory to points in Eastern Territory. Also, it is proposed that Item 930 of the X-343 master tariff, listing increases on paper and paper articles, be canceled.

It is ordered, That the application with regard to the proposed amendment of Item 77 and 930 of the X-343 master tariff on 30 days' notice is granted.

Authority is also requested to amend Item 925 of the X-343 master tariff, Newsprint, on statutory notice, by adding a paragraph which will make the increase applicable from Red Rock, Ont. to stations in Eastern Territory on rates subject to minimum weights of 100,000 pounds. The applicant states that this will correct an anomalous situation because newsprint paper rates have been historically maintained at the same level as Thunder Bay, Ont., which is subject to the 5 percent increase.

It is ordered, That the application with regard to the proposed amendment of Item 925 of the X-343 master tariff on 30 days' notice is granted.

The applicant also proposed to amend Item 1440 of the X-343 master tariff which now provides for a 5 percent increase, except for no increase from Warwick, Ind. to points in Eastern Territory. The proposal will cancel the first portion of the Item embracing STCC 33 341 15 through STCC 36 999 10, thus providing no increase on these items. The proposal will amend the second portion of the Item by eliminating the exception on movements from Warwick, Ind. to Eastern points, thus allowing the increase to apply.

It is ordered, That the application with regard to the proposed amendment of Item 1440 of the X-343 master tariff is granted with authority to publish on 30 days' notice.

Except as otherwise authorized, the permission granted with respect to all the above items does not modify any outstanding formal orders of the Commission nor waive any of the requirements of its rules relative to the construction and filing of tariff publications. Publications issued and filed under this permission shall bear the following notations in conjunction with the particular matter to which the permission related:

Issued on [*] days' notice; Permission No. 77-5350."

Decided November 8, 1977.

By the Commission. (Commissioner MacFarland did not participate.)

H. G. HOMME, JR.
Acting Secretary

(SEAL)

CHAIRMAN O'NEAL, concurring:

The respondents have addressed the issue of the impact of percentage general rate increases on long haul-short haul rate relationships in this proceeding to a greater extent than they have in the past. The discussion acknowledges the existence of the situation and defends the carriers' practices in addressing it. However, the discussion does not really come to grips with the basic issue of how to fairly distribute the burden of increased costs between long and short hauls. The respondents' discussion is a start toward what I hope will be a thorough discussion of this issue.

*Insert appropriate notice as authorized.

APPENDIX J**PART 1043—SURETY BONDS AND POLICIES OF INSURANCE**

Sec.

- 1043.1 Surety bond, certificate of insurance, or other securities.
- 1043.2 Insurance, minimum amounts.
- 1043.3 Combination vehicles.
- 1043.4 Brokers.
- 1043.5 Qualifications.
- 1043.6 Bonds and certificates of insurance.

AUTHORITY: The provisions of this Part 1043 issued under 49 Stat. 546, amended, 554, as amended, 557; 49 U.S.C. 304, 311, 315.

CROSS REFERENCE: Prescribed forms relating to this part are listed in Part 1003 of this chapter.

[¶ 683]

§ 1043.1 Surety bond, certificate of insurance, or other securities.

(a) *Property damage; public liability.* Except as provided in paragraph (c) of this section, no common or contract carrier subject to Part II of the Interstate Commerce Act shall engage in interstate or foreign commerce, and no certificate or permit shall be issued to such a carrier or remain in force unless and until there shall have been filed with and accepted by the Commission a surety bond, certificate of insurance, proof of qualifications as a self-insurer, or other securities or agreements, in the amounts prescribed in § 1043.2, conditioned to pay any final judgment recovered against such motor carrier for bodily injuries to or the death of any person resulting from the neg-

lignant operation, maintenance or use of motor vehicles in transportation subject to Part II, Interstate Commerce Act, or for loss of or damage to property of others.

(b) *Common carriers—cargo insurance; exempt commodities.* Except as provided in paragraph (c) of this section, no common carrier by motor vehicle subject to part II of the Interstate Commerce Act shall engage in interstate or foreign commerce, nor shall any certificate be issued to such a carrier or remain in force unless and until there shall have been filed with and accepted by the Commission, a surety bond, certificate of insurance, proof of qualifications as a self-insurer, or other securities or agreements in the amounts prescribed in § 1043.2, conditioned upon such carrier making compensation to shippers or consignees for all property belonging to shippers or consignees and coming into the possession of such carrier in connection with its transportation service: *Provided*, That the requirements of this paragraph shall not apply in connection with the transportation of the following commodities:

FEDERAL CARRIERS REPORTS

See.

- 1043.7 Forms and procedure.
- 1043.8 Insurance and surety companies; authorized.
- 1043.9 Refusal to accept, or revocation by Commission of surety bond, etc.
- 1043.10 Fiduciaries.
- 1043.11 Operations in foreign commerce.
- Agricultural ammonium nitrate.
- Agricultural nitrate of soda.
- Anhydrous ammonia—used as a fertilizer only.
- Ashes, wood or coal.
- Bituminous concrete (also known as blacktop or amosite), including mixtures of asphalt paving.
- Cement, dry, in containers or in bulk.
- Cement, building blocks.

Charcoal.
 Chemical fertilizer.
 Cinder blocks.
 Cinders, coal.
 Coal.
 Coke.
 Commercial fertilizer.
 Concrete materials and added mixtures.
 Corn cobs.
 Cottonseed hulls.
 Crushed stone.
 Drilling salt.
 Dry fertilizer.
 Fish scrap.
 Fly ash.
 Forest products; viz: Logs, billets, or bolts, native woods, Canadian wood or Mexican pine; pulpwood, fuel wood, wood kindling; and wood sawdust or shavings (single tow) other than jewelers' or paraffined.
 Foundry and factory sweepings.
 Garbage.
 Gravel, other than bird gravel.
 Hardwood and parkay flooring.
 Haydite.
 Highway construction materials, when transported in dump trucks and unloaded at destination by dumping.
 Ice.
 Iron ore.
 Lime and limestone.
 Liquid fertilizer solutions, in bulk, in tank vehicles.
 Lumber.
 Manure.
 Meat scraps.
 Mud drilling salt.
 Ores in bulk, including ore concentrates.
 Paving materials, unless contain oil hauled in tank vehicles.

Peat moss.
 Peeler cores.
 Plywood.
 Poles and piling, other than totem poles.
 Potash, used as commercial fertilizer.
 Pumice stone, in bulk in dump vehicles.
 Salt, in bulk or in bags.
 Sand, other than asbestos, bird, iron, monazite, processed, or tobacco sand.
 Sawdust.
 Scoria stone.
 Scrap iron.
 Scrap steel.
 Shells, clam, mussel, or oyster.